executed, but the Comptroller refused to reopen the case. At the trial the defense was made that the officer who issued the requisition had no authority to do so. The Court of Claims allowed a recovery and stated:

> "The deficiency as to the contract in writing was supplied, but if that had not been done, or if it was done too late to be effective for any purpose, the fact remains that the goods were supplied upon a written order accepting a bid made by plaintiff, both of which instruments supplied the price, and *after performance of the contract*, it became immaterial whether there had or had not been a strict compliance with section 3744." (Italics supplied.)

The case of *Wilson & Gross* v. *United States*, 23 Ct. Cls. 77, involved a contract to do certain work in connection with the Pension Building in Judiciary Square, Washington, D. C. The claim was for extra work performed upon oral request and for work the contractor had been orally requested to perform, but which the government itself had performed. The Revised Statutes provided that the contract had to be in writing and signed by the parties. The Court of Claims permitted a recovery for the extra work actually performed, but denied recovery for that part which had not been performed, and stated:

> "The legal effect of the oral arrangement was that if the claimant should go on with the work they would become entitled to compensation upon an implied assumpsit, for the value of so much as they should actually perform, which, in the absence of other evidence would be the price fixed by the written contract for like work, (Clark v. United States, 95 U. S. R. 543) but did not operate to deprive the defendants of their right to do the whole or any part thereof themselves."

In the case of *Weller Construction Co.* v. *United States*, 61 Ct. Cls. 261, which involved a contract to do certain con-

struction work at Camp Knox, Ky., the contract contained the following provision: "No claim for addition shall be made unless the increase was ordered in writing by the Secretary of War or his duly authorized representative and such addition to the contract price was directed as part of the settlement." One of the claims was for extra work of the value of $7,000.10, recovery for which was allowed by the Court of Claims, stating as follows:

> "The next item allowed is the sum of $7000.10 which the plaintiff expended for necessary extra work of which the defendant had the benefit. This work was done by the plaintiff upon the verbal order of the constructing quartermaster in charge of the work, but no written order was given. The work so done was necessary to the completion of the work. If it had not been done the work would have been left unfinished. Under the circumstances it does not seem to us that a written order was necessary in order that the plaintiff might be paid for it. The Government received the benefit of it and the plaintiff is entitled to recover on quantum meruit therefor."

The case of *Davis, et al.* v. *United States*, 82 Ct. Cls. 334, involved a contract to furnish certain electric machinery and equipment. The contracting officer took the position that the contractor had failed to furnish certain armored cable and other wiring shown on the plans, while the contractor insisted it was not required to furnish said material. Upon the insistence of the contracting officer the contractor furnished the material under protest. The contractor presented a claim which was denied. The Court of Claims held that the material being neither enumerated in the contract nor shown in the specifications was outside of and in excess of the plaintiff's contractual obligations. One of the defenses presented was that the plaintiff was precluded from recovery because Article 5 provided that no charge for extra work would be allowed unless the same

was ordered in writing by the contracting officer and the price stated. The Court of Claims, with respect to that defense, stated as follows:

> "It is true the price of the extra material furnished was not stated in the written order of the contracting officer, although they were specifically itemized and described in the order, for the manifest reason that the contracting officer under his construction of the contract did not regard them as extra requiring a change order within the meaning of Article 3 of the contract. The delivery of the additional material on the written order of the contracting officer in these circumstances did not come within the terms of Article 5 of the contract, and plaintiff's right to reimbursement therefor is not precluded by reason of the fact that the price of the material demanded was not stated in the order."

Further, the Court stated:

> "The defendant accepted the materials so furnished and received the benefit of them. In these circumstances an implied contract arose on the part of the United States to pay the plaintiff the cost of the extra material so furnished, $2,062.00. The implied contract to pay, however, is limited to the actual cost of the materials furnished and cannot be construed to include the additional ten percent claimed by the plaintiff."

The contract in this case also contained the provision that any extra in excess of $500.00 had to be approved in writing by the head of the department and from the decision we can assume this was not done, notwithstanding the Court permitted a recovery.

In the case of *Overly, et al.* v. *United States*, 87 Ct. Cls. 231, the Court of Claims allowed a recovery for extra work where the amount involved was in excess of $500.00, although it had not been approved in writing by the head of the department. The Court said:

> "Resoldering these joints was outside of the contract, extra work ordered by the contracting officer,

and performed by the contractor, and the government has received the benefit and should pay."

In the case of *Horton* v. *United States,* 57 Ct. Cls. 395, the plaintiff had submitted a bid to do certain work for the United States, but it had not been accepted and no contract was ever signed by either the plaintiff or the government. The project manager told the plaintiff to go ahead and not wait for formal acceptance. The claim was for the expenses the plaintiff went to in preparing to perform the contract and also for some work of dredging. The Court of Claims allowed a recovery for the work actually performed, holding that while the plaintiff could not recover for his costs of preparing to perform the contract, as it had not been signed as required by law, he could, nevertheless, recover for the work actually performed upon an implied contract for labor and material furnished for which the Government received benefit, and stated:

"The invalidity of a contract is immaterial after it has been performed or partially performed. When a lawful transfer of property is executed it does not matter whether the terms of the execution were void or valid while executory, and therefore cannot be revoked or the terms changed. A promise to make a gift does not bind, but the gift cannot be taken back and the transfer in pursuance of mutual promises is not made less effectual by those promises or by the fact that money was received in exchange."

The case of *Rust Engineering Co.* v. *United States,* 86 Ct. Cls., 461, we believe is very similar to the instant case. In that case the contractor encountered, early in the prosecution of the work, subsoil conditions materially different from those shown on the drawings or specifications. The contractor was told by the contracting officer to proceed with the work, but its claim for the extra work (which was in excess of $500.00 and had not been approved in writing by the head of the department), was rejected and the con-

tractor informed it might submit its claim to the General Accounting Office. The claim was denied by the General Accounting Office. The Court of Claims, in allowing recovery, stated in part as follows:

> "The changes made necessary by reason of the conditions encountered in excavating for the foundations of the building were not reasonable changes within the scope of the drawings and specifications as contemplated by Art. 3 of the contract, but represented important changes based upon changed conditions which were unknown and materially different from those shown on the drawings or indicated in the specifications. Such changes were, therefore, clearly not within the contemplation of either party to the contract at the time it was made. On the facts disclosed plaintiff is entitled to recover for this item. But its recovery must be limited to the actual costs incurred without profit."

. . In the instant case, early in the prosecution of the work subsoil conditions materially different from those indicated in the specifications were encountered and the contractor conferred with Government representatives and was told to complete the work and then make up a proposal of the added cost. The undisputed facts are that in preparing the plans and specifications for the work no consideration was given to the character of the soil to be encountered, that the extra work was necessary and the Government has received the full benefit thereof and the cost was reasonable. As in the *Rust* case, the claim was rejected by the Board of Awards on legal grounds and the contractor told it had the right to present the claim to the Comptroller General, which it did, and the Comptroller General rejected the claim upon legal grounds. In the *Rust* case the extra work was not approved in writing by the head of the department, yet the Court did not let that fact stand in the way of doing justice and paying the contractor for neces-

sary extra work performed, and we see no reason why the Court cannot do justice in the instant case and permit a similar recovery.

2

THE COURT OF CLAIMS ERRED IN HOLDING THAT THE PETITIONER COULD NOT RECOVER FOR EXTRA WORK BECAUSE THE CONTRACTOR DID NOT APPEAL TO THE HEAD OF THE DEPARTMENT FROM THE DECISION OF THE CONTRACTING OFFICER.

Article 15 provides in part as follows: "——all disputes concerning *questions of fact* arising under this contract shall be decided by the contracting officer or his duly authorized representative, subject to written appeal by the contractor within thirty days to the head of the department, whose decision shall be final and conclusive upon the parties thereto as to such *questions of fact.*" (Italics supplied.)

The Director of Procurement in his letter of May 2, 1934 rejecting the claim stated in part as follows:

> "A thorough review of the data in this case indicates that the extra you are claiming is not *legally allowable* and your proposal above described is therefore rejected." (Italics supplied.) (R. 26.)

There is nothing in the letter to indicate that the Director of Procurement was making a decision upon a question of fact but, on the contrary, it shows clearly that he was making a legal decision, which is supported by the report of the Procurement Division which states in part as follows:

> "Thereafter the claim was extensively reviewed, both from an engineering and legal standpoint, and preliminary steps were taken with a view to submitting the matter to the Comptroller General. So many doubts were involved from a *legal* standpoint however that it was ultimately decided that the claim should be rejected and the contractor advised that that claim might be filed with the Comptroller General, which pro-

> cedure would give the contractor an opportunity to argue its own case. The contractor was thus advised by letter of May 2, 1934 that the claim was not considered *legally* allowable and that it might be presented direct to the Comptroller General." (Italics supplied.)

The foregoing shows clearly that the contracting officer was not making a decision interpreting the drawings and specifications, but a legal decision and, therefore, not binding on the contractor. The Court of Claims has held on numerous occasions that it is the province of the Court to make decisions on questions of law. In the case of *Callahan Construction Co.* v. *U. S.*, 91 Ct. Cls. 538-616, the Court of Claims said in part:

> "In Davis, et al. v. U. S. 82 Ct. Cls. 334, this Court held that the competency of the parties to a government contract to stipulate that the decision of disputed questions by the contracting officer of the government, or by the head of the department on appeal, shall be final and conclusive is limited to *questions of fact* and, therefore, does not include questions involving the construction of the contract, which are questions of law." (Italics supplied.)

In *Penker Construction Co.* v. *U. S.*, 96 Ct. Cls., 1-36, the Court of Claims held that such provisions were not intended to give the contracting officer power to make final and conclusive decisions on questions of law.

At every stage of the proceedings the contractor did exactly as it was told to do. It was first told to carry on all business with Mr. Melick (R. 19, to whom it reported the condition of the soil (R. 22). It was told to leave the temporary timber sheeting in place (R. 22, which it did. It was told to wait until the work was complete and then submit a proposal (R. 22), which it did. It was requested to submit another proposal R. 24), which it did (R. 24), and then

when its claim was rejected it was informed that it had a right to present the claim *direct* to the Comptroller General (R. 27), which it did (R. 29).

The letter of May 2, 1934, rejecting the claim, stated in part as follows:

> "While the review of the case indicates, as stated above, that there is no tenable legal ground for the claim, if you believe that it presents equitable considerations in your favor *you have the right to present the claim direct to the Comptroller General.*" (Italics supplied.) (R. 26-27.)

That is what the contractor did, and now the respondent complains because he did the very thing it suggested the contractor do. In this connection the Court's attention is invited to the recent case of *Thomas Earle & Sons, Inc.* v. *U. S.*, 100 Ct. Cls. 494, decided January 3, 1944, wherein the plaintiff, a government contractor, was making claim for expenses during the fifteen day suspension of the work, and was advised by the contracting officer that he did not have jurisdiction and the claim should be submitted to the Comptroller General, whereupon the plaintiff did submit the claim to the Comptroller General, who denied it. In that case the government took the position that since the plaintiff had not appealed from the decision of the contracting officer, it was not entitled to recover. The Court of Claims, in denying that contention, stated in part as follows:

> "The Government urges that plaintiff's claim may not be considered because it failed to pursue its remedy under the contract in that it did not appeal from the decision of the contracting officer to the head of the department, within the 30 days specified in Article 15 of the contract or at any time. We disagree with this contention. The contracting officer's message of June 12, 1934, was not a decision on the merits of the plain-

> tiff's claim. It was a disclaimer of jurisdiction to decide it under the provisions of the contract, and an unqualified statement that jurisdiction to decide it was in another officer of the Government, wholly outside the Navy Department. If that advice was correct, the plaintiff has lost no rights here by following it. If it was not correct, the plaintiff still has lost no rights as a consequence of being misled by it. The advice was given by the Chief of the Bureau of Yards and Docks, the official in the Department who was held out to the public and the plaintiff as an official competent to bind the Government by committing it to important contracts, and making important decisions in regard to them. If one dealing with the Government could not even safely trust this official's direction as to where to go next in search of a decision upon his claim in relation to the very contract which this very officer had made with him, he would be hopelessly lost in the mazes of the Government's organization."

A careful study of the undisputed facts shows that the rejection of the contractor's claim in the letter of May 2, 1934 was not a decision on a question of fact as contemplated by Art. 15. The letter of May 2, 1934, written by Admiral Peoples, Director of Procurement, very definitely stated that a review of the case indicated there was no *legal* ground for the claim, and then went on to say that the contractor had the *right* to present the claim *direct* to the Comptroller General, if the contractor believed the claim presented any *equitable* considerations, and that is exactly what the contractor did, present the claim to the Comptroller General, who again rejected it upon legal grounds. The minority opinion states that while the rejection was put upon the cryptic grounds that the claim was "not legally allowable," the letter of February 27, 1936 seems to show the rejection was upon the ground that the contractor was doing no more than the contract required.

The part of the letter of February 27, 1936, to which the minority opinion refers, is probably the following:

> "The work was necessary, and the proposal of July 17, 1933, slightly revised, would have been accepted *in advance* of the work but for doubts *then* entertained as to the scope of the contract requirement." (Italics supplied.) (R. 30.)

A review of the sequence of events shows that the extra work was started in July, 1933, and had been completed by January 1934. The letter of rejection was written in May, 1934. It will be noted that the report of February 27, 1936 does not state that the claim was rejected because of any doubts as to the contract requirements, but that the revised proposal "would have been accepted in *advance* of the work but for doubts *then* entertained as to the scope of the contract requirement." (Italics supplied.) Not doubts that existed on May 2, 1934, but doubts that existed back in July, 1933. On the contrary the rejection of May 2, 1934 clearly shows that it was not a decision on a dispute of fact, as if such had been the case there would have been no occasion for the letter, after definitely stating there was no legal ground for the claim, to then go on to say "if you still believe that it presents *equitable considerations* in your favor you have the *right* to present the claim *direct* to the Comptroller General." (Italics supplied.) (R. 27.)

Reference is again made to the case of *Rust Engineering Co.* v. *United States, supra,* where this same question was involved. The contractor's claim was rejected by the Board and it was advised it might submit the claim to the General Accounting Office if it so desired. Defense was made that the contractor, having failed to appeal to the head of the

department, was barred from recovering. The Court of Claims stated as follows:

> "Appeals were necessary under the contract only on disputes concerning questions of fact, and there was no controversy as to the facts. The board, even if its action could be considered as a decision of the contracting officer, made no finding of fact. *There was, therefore, nothing from which an appeal was required to be taken.*" (Italics supplied.)

In the instant case the rejection of May 2, 1934 did not make any finding of fact from which an appeal could have been taken. On the contrary it stated there was no legal ground for the claim, and told the contractor he had the right to present the claim direct to the Comptroller General.

But there is still another part of Mr. Simon's report which we believe shows conclusively that the letter of May 2, 1934 rejecting the claim was not upon the grounds of any doubts as to the contract requirements, as he states:

> "Thereafter the claim was extensively reviewed, both from an engineering and legal standpoint, and preliminary steps were taken with a view to submitting the matter to the Comptroller General. So many doubts were involved from a *legal* standpoint however that it was ultimately decided that the claim should be rejected and the contractor advised that the claim might be filed with the Comptroller General, which procedure would give the contractor an opportunity to argue its own case. The contractor was thus advised by letter of May 2, 1934 that the claim was not considered *legally* allowable and that it might be presented direct to the Comptroller General." (Italics supplied.)

From the foregoing it will be seen that while the claim was reviewed from both an engineering and legal standpoint, the only doubts which existed at the time the letter

of May 2, 1934 was written, rejecting the claim, were "from a legal standpoint."

Conclusion

For the reasons stated and on the authorities cited we submit that the writ of certiorari should be granted and that judgment should be reversed.

Respectfully submitted,

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